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Supreme Court, U.S.
FILED
OCT 7 - 2008
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No. 08-309

IN THE SUPREME COURT OF THE UNITED STATES

*****

MARY ATTEBURY
Chief Operating Office of the
Northwest Missouri Psychiatric Rehabilitation Center
Petitioner,

v.

FREDERICK LEE REVELS
Respondent.

*****

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Frederick Lee Revels moves the Court for its order permitting him to file the attached brief in opposition to petition for a writ of certiorari *in forma pauperis*. Respondent has proceeded in the court of appeals through counsel appointed under 18 U.S.C. §3599 (formerly 21 U.S.C. §848(q)(4)-(10).

Respectfully submitted,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*****

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After his arrest in 1988, Frederick Lee Revels was acquitted of murder by reason of insanity in 1992. With the exception of two brief periods of conditional release, he has been in a Missouri Department of Mental Health facility ever since. In order to obtain release, Missouri law requires Mr. Revels to prove by clear and convincing evidence that he is not likely to be dangerous by reason of mental illness in the future. The Missouri courts reviewing his 2003 petition for release determined that he had not established lack of future dangerous as required by statute, and denied release. Under this Court's holding in *Foucha v. Louisiana*, 507 U.S. 71 (1992), that in order to confine an insanity acquittee, there must be a finding that he is BOTH presently mentally ill AND presently dangerous. Finding that Missouri law violated Mr. Revels's rights under *Foucha*, and that the Missouri courts' contrary holding was an unreasonable application of *Foucha*, the Eighth Circuit granted relief.

QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD REVIEW THE EIGHTH CIRCUIT'S INTERPRETATION OF THE CERTIFICATE OF APPEALABILITY GRANTED IN THIS CASE WHEN THE COURT CORRECTLY APPLIED 28 U.S.C. §2253, AND ANY PROCEDURAL ISSUE IS CASE-SPECIFIC?

II. WHETHER THIS COURT SHOULD REVIEW A CASE IN WHICH THE COURT REACHED A RESULT WHICH IS OF LIMITED APPLICATION AND IS CLEARLY CONSISTENT WITH THE CONSTITUTION AND HABEAS CORPUS LAW?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

STATEMENT

Frederick Lee Revels has been in the custody of the Missouri Department of Mental Health since 1988. After a period of incompetence to stand trial, he entered a plea of not guilty by reason of insanity which was accepted by the trial court in 1992. Pursuant to Missouri law, he was then committed to the Department of Mental Health.

Mr. Revels was diagnosed with Substance-Induced Psychotic Disorder with Delusions and Hallucinations at the Time of the Offense, a psychosis which was related to his use of alcoholic beverages when the offense occurred. Since 1995, the Department of Mental Health has prescribed no psychotropic medications for Mr. Revels. The most recent administration of such medication was in 1994, when Mr. Revels was prescribed an anti-psychotic medication to control anger and anxiety while on conditional release. After he had taken the medication for a short time, Mr. Revels and his doctor agreed that it was not necessary and it was discontinued.

Mr. Revels was granted conditional release on two occasions. Both releases were revoked for technical violations of his conditions of release. He has committed no crime of any kind since 1988. Nor has he ever been found to have consumed any alcoholic beverages.

In 2003, Mr. Revels applied to the circuit court of Jackson County, Missouri (the court from which he had been committed) for unconditional release pursuant to Mo. Rev. Stat. §552.040.[1] Two psychiatrists, Dr. A. E. Daniel, M.D., and Dr. James Bradley Reynolds, M.D., testified at the hearing on Mr. Revels's petition. Both psychiatrists agreed that at the time of hearing, Mr. Revels showed no signs of psychosis or thought disorder.

Dr. Daniel gave his opinion that Mr. Revels's illness was in total remission, and had been since at least 1995. He testified, "Mr. Revels "does not suffer from any psychotic condition at the present time." Dr. Daniel also testified that Mr. Revels had no thought disorder, suicidal ideation, thoughts about harming others, or auditory or visibly hallucinations. Dr. Daniel further noted that there was no documentation of any hallucinatory symptoms for at least ten years before the hearing—since 1992. According to Dr. Daniel, Mr. Revels had good insight into the factors that led to his commission of the offense, including the way that alcohol and substance abuse caused his symptoms. Reports that Dr. Daniel reviewed indicate that Mr. Revels takes full responsibility for the commission of the offenses.

Dr. Daniel testified, to a reasonable degree of medical certainty, that Mr. Revels "will not be dangerous to others or to himself as a result of mental illness or disorder." Further, he would not now or in the reasonable future be likely to

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[1] The petitioner expends considerable space describing earlier proceedings in Mr. Revels's case. However, the only proceeding before the Court at this time is the 2003 application.

commit another violent crime against another person because of mental illness. Finally, Dr. Daniel testified that Mr. Revels "is capable of conforming his conduct to the requirements of the law and it's [sic] expectations."

On cross-examination, Dr. Daniel agreed that a person with a prior history of substance abuse is more likely to abuse substances again than someone with no prior substance abuse history, and that it was "possible" that Mr. Revels would use substances to an extent that would trigger a psychosis. But, he added, "The intervening variable in Mr. Revels' [sic] case is that he has gained significant insight and understanding of the connection between substances and the offense he has committed and he is continuing to participate in one of the programs that St. Joseph's Center offers to a reasonable extent." Thus, Dr. Daniel concluded, even if Mr. Revels were released without oversight from the hospital, he would not be at risk to relapse.

Dr. Reynolds , the Medical Director of the hospital where Mr. Revels is confined, testified, "To a reasonable degree of medical certainty I do not believe he currently suffers from a psychotic illness;. . . . I cannot detect any formal thought disorder in Mr. Revels at this time." He could detect no signs or symptoms of mental disease or defect in Mr. Revels. He agreed with Dr. Daniel that any mental illness was "in remission," but added that such a mental illness could come back. However, he did not believe that Mr. Revels was *presently* likely to be dangerous to himself or others due to a mental disease or defect.

Dr. Reynolds testified on cross-examination that Mr. Revels's treatment team did not recommend unconditional release. He said such a release would "circumvent. . . our system," which "almost invariably includes a recommendation. . . for a conditional release to observe that patient's performance in the community. . ." Because a person who is unconditionally released is not under any obligation to continue treatment, "[W]e have no way of determining their remaining free of dangerous behaviors or free of mental health symptoms."

Dr. Reynolds testified that there were three factors which allowed him to determine whether a person was unlikely to pose a danger to himself or others in the future if unconditionally released. Mr. Revels met the first two criteria. He did not have psychotic symptoms, and he was not on medication. However, he testified that only because Mr. Revels had not recently had a successful period of conditional release, "I cannot say to a reasonable degree of certainty. . . that he is not likely to pose a danger to himself or others due to a mental disease or defect."

The committing court denied Mr. Revels's petition for unconditional release. The court found that Mr. Revels still had a mental illness, although he acknowledged that both doctors said it was in remission. On the issue of whether Mr. Revels would be dangerous in the future, the committing court accepted the testimony of Dr. Reynolds, rejected that of Dr. Daniel, and held, "The evidence requires that the defendant not be released because he has not shown he is not likely to be dangerous."

Mr. Revels appealed the committing court's decision to the Missouri Court of Appeals, Western District. Although Mr. Revels's brief on appeal expressly cited his constitutional due process right to release, including the applicable United States Supreme Court authority, *Foucha v. Louisiana*, 507 U.S. 71 (1992), the court of appeals did not address the constitutional standard. Citing only Missouri law, the court held that Mr. Revels had not demonstrated by clear and convincing evidence "that he is not likely to suffer from a mental disease or defect in the reasonable future," nor "that he will not be a danger to himself or others." Therefore, the court affirmed the committing court.

Mr. Revels then filed a *pro se* petition for writ of habeas corpus in the U.S. District Court for the Western District of Missouri. That court denied relief and denied a certificate of appealabilty. However, the Eighth Circuit Court of Appeals granted a certificate of appealability as to the following issue:

> Appellant Frederick Revels' application for a certificate of appealability is granted as to his claim that his due process rights were violated when his June 2003 amended application for release from confinement was denied; more specifically, whether the Missouri Court of Appeals's conclusion that Revels was required to show he "currently does not suffer from mental illness and was not likely to have a mental disease or defect in the reasonable future and that he. . . no longer (sic) poses a danger to society," *State v. Revels*, WD64433, at 3 Mo Ct. App. Aug. 16, 2005), is unreasonably wrong in light of the Supreme Court's decision in *Foucha v. Louisiana*, 504 U.S. 71 (1992).

The United States Court of Appeals for the Eighth Circuit reversed the district court and granted relief. Rehearing was denied. Mr. Revels's custodian, represented by the Attorney General of the State of Missouri, files this petition for writ of certiorari.

REASONS CERTIORARI SHOULD NOT BE GRANTED.

I. THE COURT OF APPEALS PROPERLY APPLIED CERTIFICATE OF APPEALABILITY LAW.

Because Mr. Revels proceeded *pro se* in the district court, the Court of Appeals had to draft the certificate of appealablity order itself by construing his pleadings; he did not file any pleading requesting a certificate of appealability. Commendably, the court identified the issue as to which "reasonable jurists could disagree" in this case: Whether the unique requirement of Missouri's statute governing release of insanity acquittees which provides that they must prove lack of *future* dangerous in order to be released violates *Foucha v. Louisiana*, 504 U.S. 71 (1992).

The court of appeals's order granting COA granted review to determine "Whether the. . . conclusion that Revels was required to show he 'currently does not suffer from mental illness and was not likely to have a mental disease or defect in the reasonable future and that he. . . no longer (sic) poses a danger to society,'. . . is unreasonably wrong. . . ."

In his Eighth Circuit brief, Mr. Revels argued (through his appointed counsel) that the requirement that he prove lack of future dangerousness was unconstitutional for two reasons. First, he argued that the state court's conclusion that he was mentally ill was a clearly unreasonable finding based on the facts before it. See 28 U.S.C. §2254(e)(2). Since Mr. Revels is not mentally ill, the brief argued, his dangerous, future or present, is irrelevant; under *Foucha*, he must be released.

In the alternative, Mr. Revels argued that even if the finding that he was mentally ill was proper, *Foucha* held that an insanity acquittee can be held only if he is both mentally ill and *presently* dangerous. Because Missouri law imposes an additional burden in order to obtain release, it violates *Foucha*.

The Court of Appeals, however, held that review of the state court finding that Mr. Revels was mentally ill was foreclosed by the wording of the certificate of appealability: "[T]he circuit court's factual findings are not before us. Rather, under the certificate of appealability, our review is confined to the issue of whether the Missouri Court of Appeals unreasonably applied *Foucha* in determining that the state court continue to hold Revels based on future dangerousness alone." *Revels v. Sanders*, 519 F.3d 734, 743 (8th Cir. 2008).

On *that* issue, the Court of Appeals concluded, "Requiring an insanity acquittee to prove both a lack of present mental illness and dangerousness, is

clearly contrary to *Foucha*[2], and violates the substantive protections of the Due Process Clause as defined by the Supreme Court." *Id.* at 742.

In a rather confusing dissent to the denial of rehearing, Judge Colloton, joined by three other judges, asserted that the panel thought "it was compelled to disregard the state court's finding of present mental disease or defect. . . ." and that the panel had misconstrued the certificate of appealability provision of 28 U.S.C. §2253. But that is a misreading of the panel opinion. Instead, the panel clearly stated that under the certificate of appealability, it could not review whether Mr. Revels suffered from a mental disease or defect, as Mr. Revels asked, and was *bound* by the state court finding that Mr. Revels was mentally ill.

The panel's application of the certificate of appealability requirement was straightforward. It declined to read the certificate of appealability broadly to include the issue Mr. Revels wanted considered, whether he was properly found to have a mental disease or defect. This application of §2253 is entirely consistent with both the legislative intent to limit appeals from denials of habeas corpus relief and the practice of the Eighth Circuit and other courts. For example, in *Carter v. Hopkins*, 151 F.3d 872, 874 (8th Cir. 1998), the court held,

> Carter contends that our review is not limited to those issues identified in the district court's certificate of appealability and that we are free to consider any and all issues so long as a certificate has issued. This argument fails, however, in light of our recent holding that appellate review is limited to the issues specified in the certificate of appealability. See *Ramsey v. Bowersox*, 149

[2] *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992).

F.3d 749, 759 (8th Cir. 1998) (citing *Lackey v. Johnson*, 116 F.3d 149 (5th Cir. 1997)); see also *Murray v. United States*, 145 F.3d 1249 (11th Cir. 1998).

Having determined not to review the Missouri courts' finding that Mr. Revels had a mental illness, however, the court of appeals did not *ignore* that finding. Rather, the panel recognized that under *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992), such a finding was not sufficient to permit a state to hold an insanity acquittee in a mental health facility. The panel then went on to hold, as discussed in more detail below, that Missouri's *additional* requirements violated *Foucha*. Thus, the petitioner's first Question Presented is based on an erroneous premise; the Eighth Circuit simply did not do what the petitioner says it did. Review of this question is, therefore, not appropriate.

II. EVEN IF THE EIGHTH CIRCUIT PANEL MISSTATED CERTIFICATE OF APPEALABILITY LAW IN THIS CASE, THERE IS NO PATTERN OF SUCH ERRORS WARRANTING THIS COURT'S ATTENTION.

Urging rehearing, Judge Colloton referred to the panel's interpretation of the effect of a certificate of appealability as "novel." Without conceding that the circuit court's treatment of the certificate of appealability requirement in this case is incorrect, Mr. Revels concedes that some statements in the opinion are somewhat confusing. Of particular concern to Judge Colloton and the other judges dissenting to the denial of rehearing was the panel's assertion that, under the certificate of

appealability, "our review is confined to the issue of whether the Missouri Court of Appeals unreasonably applied *Foucha* in determining that the state could continue to hold Revels based on future dangerousness *alone*." *Revels v. Sanders*, 519 F.3d 734, 743 (8th Cir. 2008) (Emphasis added). As discussed above, however, when this statement is read in context, it is clear that the panel meant that they must decide whether the future dangerousness requirement was constitutional rather than whether Mr. Revels was being held without having a mental illness.

Any difficulty with the panel's characterization of the certificate of appealability in this case is quite case-specific. Neither Judge Colloton's opinion nor the petition in this case has presented this Court with any pattern of cases suggesting that this is a problem which is widespread or even likely to recur. The petition in this case, in fact, cites this Court to no other case, in Missouri or in any other state in the union, in which this mistake, if that is what it was, has been made. Nor has this Court been cited to any case with which this holding conflicts. This "novel" interpretation, if that is what it was, is not in conflict with other circuit courts of appeals. Nor is it such a departure from the usual course of judicial proceedings as to merit this Court's supervisory power. Sup. Ct. R. 10. This Court's scarce resources would be better used for other cases.

III. THIS COURT NEED NOT REVIEW THIS CASE BECAUSE THE EIGHTH CIRCUIT DECIDED IT CORRECTLY, AND THE RESULT HAS VERY LIMITED APPLICATION.

At issue in this case is Mo. Rev. Stat. §552.040, which provides the standards for release of insanity acquittees. The statute first provides,

> The burden of persuasion for any person committed to a mental health facility under the provisions of this section upon acquittal on the grounds of mental disease or defect excluding responsibility shall be on the party seeking unconditional release to prove by clear and convincing evidence that the person for whom unconditional release is sought does not have, *and in the reasonable future is not likely to have*, a mental disease or defect rendering the person dangerous to the safety of himself or others.

Mo. Rev. Stat. §552.040.7(6), emphasis added. The statute reiterates,

> No committed person shall be unconditionally released unless it is determined through the procedures in this section that the person does not have, *and in the reasonable future is not likely to have*, a mental disease or defect rendering the person dangerous to the safety of himself or others.

Mo. Rev. Stat. §552.040.9. (Emphasis added.)

The statute further provides that a person like Mr. Revels who was found not guilty by reason of insanity of first degree murder must show, to obtain release, that:

> (1) Such person is not now [likely] and *is not likely in the reasonable future* to commit another violent crime against another person because of such person's mental illness; and
> (2) Such person is aware of the nature of the violent crime committed against another person and presently possesses the capacity to appreciate the criminality of the

> violent crime against another person and the capacity to conform such person's conduct to the requirements of law in the future.

Mo. Rev. Stat. §552.040.20, emphasis added.

Foucha v. Louisiana, 504 U.S. 71, 77 (1992), established two requirements for a state to hold a person who has been acquitted of a crime by reason of insanity. Those two requirements were not alternatives; rather, the court held that they must BOTH exist or the person could not be held. The two requirements were the existence of a present mental illness and dangerousness. In *Foucha*, the situation was the reverse of that in Mr. Revels's case; Mr. Foucha no longer suffered from any mental illness, but the state contended that he was a dangerous sociopath and should be held for that reason. The court held that since a mental illness was the only justification for holding someone who has no criminal conviction, dangerousness alone was not enough; rather, as for a civil commitment, *both* dangerousness and a mental illness must be shown.

The Missouri Court of Appeals found that the circuit court had relied on the testimony of Dr. Reynolds that he could not determine, to a medical or professional certainty, that Mr. Revels was not "likely in the reasonable future to commit another violent crime against another person because of such mental illness." Thus, the court reasoned, Mr. Revels had not met his burden under Mo. Rev. Stat. §552.040, and was not entitled to release. But that requirement is, as the Eighth Circuit found, clearly contrary to *Foucha*: "The acquitted may be held as long as he

is **both** mentally ill and dangerous, but no longer." *Foucha v. Louisiana, 504 U.S. 71, 77* (1992). (Emphasis added.)

In her petition, Mr, Revels's custodian attempts to avoid this conclusion by mischaracterizing the holding of *Foucha v. Louisiana*, 504 U.S. 71, 77 (1992). Quoting selectively, she characterizes *Foucha* as holding "that the Due Process Clause prohibits 'the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others.'" *Id.* at 83. The *Foucha* opinion indeed includes that statement. But its holding is not so narrow. Rather, it clearly holds that there are TWO requirements for holding an insanity acquittee, mental illness and dangerousness. Mr. Foucha was dangerous but not mentally ill. Mr. Revels may be mentally ill using a very expansive definition of that term, but he is not presently dangerous. Under the *Foucha* standard, neither Mr. Foucha nor Mr. Revels may be held. Thus, the Eighth Circuit correctly decided Mr. Revels's case.

The petitioner attempts to manufacture a conflict among states in this case by citing cases holding that a mental disease in remission is still a mental disease. Of course, the Eighth Circuit expressly rejected any holding that Mr. Revels had no mental disease. And the applicable statutes in the cases cited by the petitioner are substantially different from Missouri's.

The Maine statute in *Green v. Com'r of Mental Health and Mental Retardation*, 750 A.2d 1265 (Me. 2000), provides, "If, after hearing, the court finds

that the person may be released or discharged without likelihood that the person will cause injury to that person or others due to mental disease or mental defect, the court shall order. . . [r]elease from the institution. . . ." 15 M.R.S.A. § 104-A(1)(A) (Supp. 1999). Unlike Missouri's statute, the Maine statute does not require an insanity acquittee to prove that there will be no mental illness or danger in the "reasonable future."

The Montana statute at issue in *State v. Woods*, 285 Mont. 46, 945 P.2d 918 (Mont. 1997), also cited by the petitioner, is even more restrictive than the Maine statute, expressly requiring that any risk of injury be substantial and imminent. It mandates release when:

> [T]he person no longer suffers from a mental disease or defect that causes the person to present a *substantial risk of serious bodily injury or death* to the person or others, a *substantial risk of an imminent threat* of physical injury to the person or others, or a substantial risk of substantial property damage[.]

§46-14-302(1), MCA, emphasis added. The Montana statute does not mention future dangerousness. The acquittee's burden to obtain release is clearly lighter than that imposed by the Missouri statute.

Finally, the petitioner cites *State v. Klein*, 156 Wash.2d 103, 124 P.3d 644 (Wash. 2005), a case involving a Washington statute providing:

> The burden of proof shall be upon the petitioner to show by a preponderance of the evidence that the petitioner no longer presents, as a result of a mental disease or defect, a substantial danger to other persons, or a substantial likelihood of committing criminal acts jeopardizing public

> safety or security, unless kept under further control by the court or other persons or institutions.

RCW 10.77.200(2). Like the Maine and Montana statutes, the Washington statute does not mention any requirement that the insanity acquittee establish that he will not become mentally ill or dangerous in the future. And, unlike the Missouri statute, the Washington statute requires the acquittee to show his entitlement to release only by a preponderance of the evidence.

The cases cited by the petitioner do not demonstrate a conflict with the decision of the Eighth Circuit here. They dealt with different statutes and different factual scenarios, and their decisions are entirely consistent with *Foucha v. Louisiana*, 507 U.S. 71 (1992).

The Missouri courts' application of *Foucha*, on the other hand, was clearly unreasonable within the meaning of 28 U.S.C. §2254(d). Facing a factual situation indistinguishable from that discussed in *Foucha*, the Missouri courts apparently ignored its holding. "A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involving an unreasonable application of . . . clearly established Federal law.'" *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-408 (2000).

Whatever the merits of the Eighth Circuit's decision, however, it is still not deserving of this Court's review. As discussed above, Missouri's "future dangerousness" requirement appears to be unique among statutes providing the

requirements for release of an insanity acquittee. At least, the petitioner has certainly not presented this Court with any comparable state statute.[3] Since other jurisdictions seem to be able to deal with the problem of release of insanity acquittees without imposing a requirement that they prove lack of future dangerousness, this Court need not concern itself with the Eighth Circuit's decision holding this unusual provision of Missouri law unconstitutional.[4]

CONCLUSION

For these reasons, this Court should deny a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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[3] In support of her Eighth Circuit petition for rehearing, the petitioner cited cases from Iowa, Minnesota, Arkansas, Nebraska, and federal court. None involved statutory provisions comparable to Missouri's lack of future dangerousness requirement.

[4] Even in Missouri, the impact of this statute is slight. As of the date of this brief, Dr. Richard Gowdy, Director of Forensic Services, Missouri Department of Mental Health, reports there are approximately 400 insanity acquittees under the Department's jurisdiction; approximately 40 were acquitted of first degree murder.